THE HISTORY

OF THE

THEORY OF SOVEREIGNTY.

"Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, in the University Faculty of Political Science, Columbia College.

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NEW YORK:
1895.

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THE HISTORY OF THE THEORY OF SOVEREIGNTY.

"Since the century during which the Roman emperors were at the mercy of the Prætorian soldiery there has been no such insecurity of government as the world has seen since rulers became the delegates of the community" (1). It is in harmony with this statement of an eminent English jurist that the distinguished president of the National Bar Association in our own country wrote that our recent civil disorders indicate the necessity for reviewing the work of those whom we have been accustomed to respect as the founders of our liberty (2); and it is perhaps not untimely in the light of these reflections to revert to first principles, and by a re-examination of ancient and of modern theories to seek for political discussion a more scientific foundation than it ordinarily obtains. It was with this purpose in view that the present essay was undertaken.

History, even in her earliest records, presents no instance of any nation or tribe that has been absolutely without governmental authority, which could impose restraint upon the passions of those subject

(1) Sir H. S. Maine, Popular Government, p. 21.

(2) Thos. M. Cooley, *Forum*, Sept., 1894.

to it, and give some protection to the community against the lawless conduct of individuals. In its primitive form, political power is the feeling of the community acting through an informally established, fugitive agency. The ideas and usages of the rudest society, apparently structureless, form a kind of invisible framework, serving rigorously to restrain certain classes of its actions (1). It is a natural and uncontrollable impulse of the human mind to demand a satisfactory basis for the exercise of such authority. By what right does the community; by what right do those in authority command my obedience? This is a fundamental query of political philosophy; its answer is a theory of the State, and its scientific kernel the conception of sovereignty. Political thought is an historical product, whose systematic development has been parallel with the advance of civilization in political institutions, and it is through a study of this development that the true theory of the State consistent with the monitions of history and the needs of the present may, with most certainty and precision, be ascertained. Though each age presents its new phases of political thought, and though few questions concerning the State which now receive attention impressed the ancient Greeks as of the first importance, the doctrine of sovereignty has received recognition, *semper ubique ab omnibus*, whenever there has been any political discussion at all; often, however, only to be rendered unmeaning by limitations and restrictions, to be belied and

(1) Herbert Spencer, Political Institutions, § 467, p. 321-322, cf. §483, p. 365.

inveighed against as the "will o' the wisp of politics, the search after which is fruitless because it does not in fact exist"(1). The doctrine of sovereignty is the dogma of the supremacy of the controlling political power in a community. Sovereignty is the [illegible]l, absolute, unlimited and universal power over .ndividual subject and over all associations of .ojects in the State (2). Though this definition is itself the result of an endless evolution of political thought—an evolution which begins when the primitive community first feels and perceives its unity, the germinal essence of the definition is inherent in all political discussion which checks itself by any reference to the actual conditions of society in the external political world.

Sovereign is derived from the French *souverain*, meaning excellent, highest, supreme, found in all idioms of Latin origin, and traceable to the original *superanus*, an adjective from *super* (3). Sovereign was first politically applied to the chieftians of feudal Europe. Its use and derivation were not essentially different from those of prince and *fürst*, as indicated by Carlyle in his Heroes and Hero Worship. The term sovereignty arose in France and is not older than the middle ages, when it was first applied to every authority which gave a final decision; grad-

(1) Chas. Reemlin, Science of Politics; Phila., 1876. Hammond, Wm. G., in notes to Lieber's Hermeneutics. p. 250. "The Fiction of Sovereignty within the State."

(2) Political Science and Comparative Constitutional Law, p. 52.

(3) Du Cange, Glossarium Mediæ et Infimæ Latinitatis.

ually it ceased to be applied to mere branches of the administration, and was limited to the highest ruling power of the State, and in time became denominative of the State's concentrated power (1). Though "this feudal word born of the despotism of the middle ages was in truth unknown in imperial Rome," (2) that most essential principle which it indicates did not escape the legal acumen of the Roman jurist. The conception of sovereignty is not owed to the genius of an individual, nor is it the invention of a separate age. Among the ancients it appeared as an hypostasized fact; it ascends to the skies shrouded with mystery at the bidding of the early church; and again descends into the bosom of the common people at the bidding of the clergy. Natural law and the hypothesis of the state of nature refer sovereingty to the principles of contract and of property; and again public law is freed from the trammels of private by a study of history and by a logical analysis of the fact of government; and, finally, sovereignty and liberty are reconciled in our own times

(1) Francis Lieber, Political Ethics, vol. i, p. 245. J. K. Bluntschli, Theory of the State, p. 463. Trans., Oxford, 1885.

(2) J. C. Hurd, Theory of Our National Existence, p. 507; note.

SOVEREIGNTY AMONG THE ANCIENTS.

"Not all nations are endowed with political capacity or great political impulse. The highest talent for political organization has been exhibited by the Aryan nations, and by these unequally"(1). To the Greeks, political speculation was no doubt suggested by the variety of constitutions in those numerous city-states depending for their existence on the irregular topography of their native country. But it was only in connection with ethics and the ideas and ideals of justice that Greek philosophy busied itself with the conception of the State. The Sophists denied the objective nature of justice, in proclaiming man the measure of all things. This fundamental doctrine was capable of different interpretations and gave rise to opposite political constructions and opposing political tendencies: the unlimited right of the State to bring all things into conformity with the prevailing subjective view; and the unlimited right of the individual to overturn the State and rule it as a tyrant (2). The predominant aim of Socrates was the maintenance of the conditions of a fair and good life in the decay

(1) J. W. Burgess, p. 3, 4; Political Science and Comparative Constitutional Law, vol. 1.

(2) Theodore Woolsey, Political Science § 55.

of ancestral custom and tradition. Both Plato and Aristotle were convinced that man can only realize his moral destiny in society (1). "Civic life," says Plato in "The Republic," "arises out of our physical wants and it is necessary as the only means to retain virtue." And again, in "The Republic" and in the "The Laws" he invokes the poetical conception of the golden age and accounts for the origin of historical states by the influence of powerful men and common consent; and in "The Statesman" and "Critias" he proclaims the immediately divine origin of the ideal and pristine state and grounds civil obedience in an implied contract (2).

In "The Republic," Plato describes the true polity as the dominion of philosophy and the rule of the philosopher; the multitude being incapable of attaining the regal science, which is the only test of authority to command, the few competent philosophers must be unrestrained by law and irresponsible to the people. All political activity is thus confined to the governing class in the community; the orders of warriors and of artisans, including the great mass of the population, are excluded as not capable of virtue, by which Plato means knowledge.

Later in life, when the enthusiasm of this philosophic poet had somewhat cooled, Plato applied the principles of his political philosophy to the con-

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(1) Aristotle, Nicomedean Ethics, X., 10.

(2) Zeller, Plato and the Older Academy. *Cf. id.* History of Greek Philosophy.

dition in which cities actually existed in his time. "The Laws" presents a scheme of political constitution embracing a variety of enacted laws applied by magistrates responsible to the citizens; mankind in despair of finding a true ruler willingly acquiesce in any law or custom which will save them from the caprice of individuals. This law must be such as the body of citizens can be persuaded to adopt. The individual is placed under dominion at once spiritual and temporal; but the infallibility resides in the laws, and authority is exercised over him by periodical magistrates, who determine and enforce them in the name of the citizens. "It is the laws which govern, not philosophical artists of kingcraft." The law is sovereign and its authority is supreme; but the law is custom—the custom of the community. The king is but the appointee of the laws, commissioned to execute them; he is as much bound to obey them as is any other individual of the community (1).

Is it then true that Plato "never got to the point of having a theory of the state at all?" He certainly theorized much concerning the origin of the state and the residence of sovereignty; the necessity and actuality of the existence of a controlling political power in the State and the absoluteness of its character he assumes. In the ideal government of "The Republic" everything turns upon the discretionary orders of the philosophic king or oligarchy, which is supreme and is indeed

(1) Jowett's Plato, Vol. V., chap. 3, pp. 252 and 263.

identical with the state. In "The Laws" the authority of the state is vested in the community, and its exercise only is charged upon responsible magistrates. The thought of Plato was "conscious rather than self-conscious." He gives the first impulse of political speculation, but it is all wavering, tentative and not an harmonized completed system.

To the political, Aristotle ascribes the loftiest rank in the hierarchy of sciences, because it deals with the noblest matter, the nature of man in his highest relations and in the conditions in which he attains his most perfect development, as a free citizen in a free state. The standpoint of Aristotle is thus seen to be vastly different from his master, Plato. He shows a tendency to regard the individual, which is entirely lacking in Plato (1); yet he, too, fails to recognize any rights of the individual against the government because he fails to differentiate the government and the state. The state is a supreme association embracing all other associations of families, households and villages (2). It is characterized by an autonomous existence, and is a necessary product of human nature (3).

The nature of political authority is not subject to dispute, but it is doubtful what ought to be the supreme power in the State, whether the multitude or the wealthy, the best man or a tyrant? (4).

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(1) Aristotle, Politics II., 2. Weldon's Edition, p. 39.

(2) Id. I., 1, p. 1.

(3) Id. I., 2, p. 5.

(4) Id. III., 16.

Should not the law, he naïvely suggests, have the supreme power? But what if the law is itself democratical or oligarchical? (1) The Constitution, justice, reason, law, have repeatedly been declared sovereign even in our own day (2); and it is gratifying to find in Aristotle a keen appreciation of that which Rousseau so forcibly emphasized that sovereignty implies will as well as force; and that no abstraction, no principle, no formula, no rule, but that which supports the law and the Constitution is the sovereign. The principle that the multitude ought to be supreme is satisfactorily explained, because, regarded collectively, they are better than the few good, and their collective property is greater than that of the few rich.

The majority of citizens, those who take part in the legislative and judicial administration of the state, are clothed with sovereignty (3). These, by a constitution, distribute the magisterial offices among themselves according to the power which the different classes possess, and thus determine who are to be their governors and what shall be the policy of the state. Though the citizens allow the sovereign functions to be exercised by governmental authorities thus established, they have by no means thus divested themselves of the sovereignty (4).

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(1) Id. III., 10.

(2) Bliss, Sovereignty, p. 175.

(3) Aristotle, Politics, III., 1, p. 103.

(4) Id. III. 11, p. 128.

It must not be lost sight of that Aristotle made the slave an essential part of the economy of life, and that the "fierce democracies" of Greece were but "aristocracies living upon the severe taxation of a thousand subject cities and the labor of numberless white slaves."

It is unnecessary further to investigate Aristotle's classification of government, which he constantly confuses with the State, and whose "organic character rests upon the principle that no part of the population in which the consciousness of the State is strongly developed, can be kept out of its organization."

The supreme authority of the State vests in the masses, who themselves exercise its judicial and deliberate functions and who appoint and supervise their executive agents. This control of the executive is possible only through the laws, and only by holding these to be the superior interpretation and expression of the will of the supreme people. The laws, then, are supreme only as the recorded will of the supreme community. The Constitution is supreme until overthrown by the community, because it gives that organization to the multitude which is necessary to the exercise of any governmental power, and because it expresses the continuing will of the community.

Aristotle, for whose political philosophy our admiration rises the more we consider the work of his successors, is less guided by imagination than Plato; he examines reality more carefully and recognizes more accurately the needs of man. This is a real

advance of Aristotle, whose conceptions are more scientific, but in whom we seek systematic development in vain. The political power of Aristotle's State, apart from the influence of ancient custom, was limited only by the fact that the exercise of its functions belonged to the bulk of the community and by the interference of its equally absolute neighbors. "The Politics" is primarily devoted to practical rather than to theoretical questions, as, how States depart from their type, what is the best State, and what kind of laws are best for a State's permanent welfare.

With the practical extinction of Greek independence accompanying the establishment of Macedonian supremacy, political speculation gave way to a kind of cosmopolitan indifference, especially cultivated by the Stoics, to whom fell the inheritance of the best moral ideas of Greek philosophy, and who contributed largely to shape the views of the best Roman philosophy.

The Romans had greater genius for law and administration than any other people of classical antiquity, but in philosophy, science and art they halted after the Greeks *haud æquo pede et longo intervallo.* Political doctrine was no exception, and to it the Roman Imperial system gave little encouragement; in it, even Cicero, who boasts of having made Latin a philosophical language, is deficient. A State, says Cicero, in "The Republic," is a constitution of the entire people, and not every association of men, however congregated, but that association of the entire multitude bound together by a compact of

justice and a community of interest (1). Man's innate spirit of association, however, must be presumed as the cause of the state, since no primeval compact giving rise to patriotism can be discovered. Every State, if it is to be permanent, requires regulation by authority deposited in the hands of one, entrusted to a few, or vested in the whole community (2). If the people knew how to maintain their rights, they themselves would continue the sovereign dispensers of legislative, judicial, military, and treaty making powers, and of the fortune and life of each individual citizen (3). And, again, in "The Laws," Cicero declares that the civil laws are binding, not in themselves, but by the will of the people (4). The first legislators must have persuaded these that they would proclaim such laws only as would conduce to the general welfare (5). Nothing is better sanctioned by justice and natural conscience than that legal authority without which no State can exist, since human life depends upon the just administration of the law of order by magistrates established by the law of the State.

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(1) Cicero, De Republica, Bk. 1, c. 25, p. 69. Ed. Angelo Maio, London, 1823. Est igitur, res publica res populi; populus est autem non omnis hominum coetus quoque modo congregatus, sed multitudinis juris consensu et utilitatis communione societas.

(2) Id. c. 26, p. 71.

(3) Id. c. 31, p. 80, and c. 32, p. 82.

(4) Cicero, De Legibus, Ed. J. Davisius, Frankfurt a/M, 1824, Bk. II., c. 5, p. 182.

(5) Id., p. 183.

The distinction here made between the fundamental sovereign authority of the people, conceived as an organized entity, and the legal sovereignty established by the constitution of the community, is the great advance of Cicero in political theory. It is the distinction between the fundamental authority of the people, as the sovereign dispensers of their own destiny, on the one hand—an authority upon which the validity of law itself is based, and which makes law by virtue of its own inherent force and right—this *summa potestas*, in the exercise of which the people would continue had they the sense to do so; and, on the other hand, the *jus imperium* vested in the people as the highest organization of government, the ultimate governmental authority in the State, in which is vested that legal authority which must exist in every State, but which may be vested in an individual or in any number of individuals. But Cicero's first legal maxim in "The Laws" shows that he has principally in mind only the distinction between State and government, a distinction in which we found Aristotle deficient and which in itself is an important step forward (1).

The Romans first distinguished the sphere of law from that of morality, and thus brought out distinctly the legal nature of the State, making it primarily a common legal organization. Though they made the welfare of the State their highest law, the Roman State restricted the province of its own power, leaving much to social customs and to family freedom.

(1) Id. Bk. III., p. 385.

THE STATE AND THE CHURCH.

"The middle ages were essentially unpolitical," and the conditions of political philosophy were wanting. While a Cæsar wielded without remorse the supreme power of a universal empire, the absence of independent political life and the vast development of law and administration left no room for theoretical politics. When that empire succumbed to the inroads of Teutonic hordes and Europe became a "camp on conquered territory," the eclipse of the higher intellectual activities was complete. The reign of feudalism was a reign of jarring authorities, produced by territorial division and class disintegration, and gave rise to nothing but confusion in politics; the attributes of a deified world emperor became the epithets of every robber baron maintaining his family citadel with a red right hand. The reluctance of the individual Teuton to submit to any authority, even that of the community, nullified public law, and the elements of private law were interfused with all the institutions of the feudal State; territorial sovereignty was regarded as the hereditary property of the family, and public duties were treated as burdens upon land. "What remained of the Roman Empire was rather an ideal international than a political union of West-

ern Europe, and that union was held together more by the authority of the Pope and the Roman clergy than by that of the Empire"(1).

When the Western world came to regard the Bishop of Rome as the head of the Church and the representative of moral and religious power, a prominently marked dualism of Church and State gave rise to the burning political question of the middle ages: How can the claims of the Church and the State be reconciled? With the reform of the Church in the eleventh century it had ceased to be part of the State and promptly asserted a right to control it. Pope Gregory, satisfied that the different European kingdoms were feudally dependent upon the Roman See, declared civil power to be the invention of worldly men, ignorant of God and prompted by the devil. It needs not only the assistance but the authorization of the Church (2). An Alsatian priest writing in defense of Gregory further declared, the people elevates a certain person over itself to the end that he may govern and rule it according to the principles of righteous government; but if in any wise he transgresses the contract by virtue of which he is chosen he absolves the people from the obligation of submission (3). The enunciation of this papal policy opened a new channel of thought and discussion, in which flowed a vast literature appropriated to the exposition of a theory of politics, and in which so-

(1) Bluntschli, Theory of the State, p. 43.

(2) Poole, Illustrations of Mediaeval Thought, p. 229.

(3) Id., p. 232.

ciety is treated as though actually a theocracy, and politics and philosophy adjusted to a technical theological terminology. "Theology is indeed the mode of mediæval thought, but penetrating its extreme formalism, instead of unaccountable phenomena, forming a period without growth or meaning, we discover a variety of speculation and at the same time an ill-defined unity" (1).

Though the Church was not unwilling to admit any form of secular government deferring to its superior power, and though ecclesiastics of ignoble birth were especially impressed by the wrongs of the governed, it was the common ground of the political disputants of the thirteenth and fourteenth century that the papacy and the empire were both divinely ordained, and that each in its own sphere had universal jurisdiction over Christendom. The point of difference was the relation of these two jurisdictions to one another: was the temporal ruler in last resort subordinate to the spiritual, or were their dignities co-ordinate and co-equal? By the ancients revolution was looked upon as a necessity. According to Aristotle, it was due to various and often irregular changes of human conditions (2); but recurred, according to Plato, in the orderly sequence of a returning cycle. The right of revolutionizing States was first distinctly asserted by the ecclesiastical hierarchs of the middle ages, on the plea that if the temporal ruler went astray he

(1) Poole, p. 5.

(2) Aristotle, Politics, Bk. 5, last chapter.

could be judged by the spiritual; the Popes claimed authority to release subjects from the obligations to their prince because of offences against morality or religion. With the Reformation this right of revolution is shifted from religious to political grounds and thereafter regarded as belonging to the people

The State, says St. Thomas Aquinas, the greatest and profoundest of the Papal controversialists, is an organized unity representing humanity in all its properties, and having an economical as well as a moral end. It is due to man's social instinct and is not a consequence of his fall from primitive bliss (1). Society requires some control; since if many lived together, each seeking his own good, it would lack some one to seek its good and soon fall to pieces. The King, having the highest ordering of human affairs, should govern not according to the laws but to virtue; he occupies the same position in his dominions as God holds over the universe. But to the supremacy of this absolute rule there are still two limitations. The end of all government is so to order human affairs that men may best be prepared for eternal happiness, and this spiritual destiny requires the divine law to be set above human law; accordingly supreme authority in matters of faith resides in the Pope, who is the over-lord of all Christian rulers. Another limitation upon the royal power is that of the popular will, which the prudence of a

(1) Aquinas, I Summa Theologia XCVI.; De Regimine Principum I., 1; Baumann, Die Staatslehre des Thomas Von Aquino, p. 108.

prince will teach him to respect lest he excite to rebellion those of his subjects fired with the spirit of self-government. Aquinas knows no redress from government, except in conformity with existing law; he repudiates tyrannicide, in the ordinary sense, and counsels trust in God and patience. The overthrow of tyrants should be accomplished by the community, which, as it has the right of electing, has also the right to depose a prince (1).

By this comparison with the Deity the absoluteness of ancient political authority became if possible more absolute, only to be limited by the divine authority placed in the hands of a spiritual over lord. The limitation of the popular will is rather a limitation in the exercise than on the theoretic sphere of sovereignty. The influence of Aquinas, who professedly follows Aristotle, though he perhaps unconsciously returns to Plato, was great and lasting in the Catholic Church especially, and through Hooker and Locke upon Protestant thinkers.

The extreme Papal claims were set forth by John of Salisbury in the Policraticus, in which he derives the duty of tyrannicide from the authority of the Pope to release subjects from obligations to their prince. It is he also who first attempts to formulate a coherent theory in support of the imperial pretensions. But this exaltation of a civil power serves

(1) Poole, p. 242; Baumann, p. 141; De Regimine Principum I., 6.

only as a means to the erection of a higher dignity for the spiritual.

Dante in his De Monarchia, relying upon scholastic arguments from the virtue of unity and citing the precedents of history, enforces the claim of the Emperor to independence and maintains that the universal monarch, having no rival to fear, no further ambition to satisfy, no motive to rule otherwise than wisely and justly, is indispensable to human welfare. Dante's monarch, however, is not a universal despot, but a ruler set over princes of particular States, keeping the peace between them. The supreme authority of the Pope is replaced by the sovereignty of the Emperor.

The conception of monarchic sovereignty is thus developed and becomes characteristic of the middle ages. The idea of the guiding and controlling head developed under the influence of the universal church was found necessary to maintain the peace of Europe amidst the confusion of feudal authorities. The Supreme Pontiff became invested with all the attributes of political sovereignty, and the notions of monarch and sovereign coalesce.

Marsilius of Padua presented the anti-papal claims of the Emperor in his Defensor Pacis. This work was undertaken in support of Louis the Bavarian, and his scheme to rescue the Empire from the unendurable pretensions of John XXII. Government, Marsilius begins, is established to maintain peace, and the State exists to render a higher life possible (1). The people is the only authori-

(1) Defensor Pacis I., 1.

tative human law-giver, since from it all right and all power proceed. The whole people can alone know its needs, and it alone can give them effect, since in it resides the supreme power of the State (1). The people requires an executive and must choose itself a ruler. When chosen, the King must be chosen by a force large enough to cope with individuals, but not so great as to overpower the community; his power proceeds from his election, and he is in no respect absolute, but subject both to the laws and to the final judgment of the popular will. Marsilius finds in the pretentions of the Papacy the chief cause of worldly discord, and he would restrict the province of the clergy to the religious instruction of the people. Spiritual power, he suggests, consists in admonition and resides in the Church, by which he understands the entire body of Christian men, laity as well as clergy, convoked in council by the civil authority.

The advance of Marsilius lay in formulating distinctly the idea that sovereignty is the supreme authority of the people residing in the people itself, and that the ruler is but a delegate of the community subject to the supremacy of the unorganized whole. Further, Marsilius freed the State from spiritual tyranny and subjected religion to the high

(2) Id. I., 12, p. 169, cited by Poole, Illustrations of Mediaeval Thought, p. 267. Dicamus, legislatorem seu causam legis effectivam primam et propriam, esse populum, seu civium universitatem. Id. I., 15, p. 175, cited Poole, p. 268. Hanc autem secundariam vero quasi instrumentalem seu executivam, per auctoritatem a legislatore sibi concessam.

discipline of the community. The ideas of Marsilius were far in advance of his time, and lay dormant until developed by Luther and Calvin in the Reformation and by Hobbes and Grotius in political doctrine.

The doctrine of lordship developed by John of Wyckliffe was perhaps the most curious scheme of polity conceived in the middle ages. Lordship is described as neither a right nor a power, but a habit of the reasonable nature essentially involved in the existence of that nature (1). In these notions are to be found, perhaps, the germs of the theory of law and legislation developed by Bentham and by Austin.

In what then consists the progress of mediæval over ancient political theory? The ancients conceded the supremacy of the State but did not derive it in theory. It was in conceiving and developing the conception of supreme authority apart from government and even from the State itself that the theorists of the middle ages advanced. A complete theory and definition of sovereignty has been the labor of modern times. To the ancients government established by the unorganized people, or that unorganized people forcibly remodeling government, was the supreme human authority. Among the mediævals supremacy is ascribed to the Papal interpretation of the Divine Will, to the divinely ordained universal monarch, and to the will of the unorganized people, by Papists, imperialists and advanced thinkers, respectively. The nearest ap-

(1) Poole, p. 283.

proach made by the ancients to the idea of sovereignty was that of State power, universal, absolute and unquestionable. This State power was the one element of modern sovereignty recognized by the ancients. The idea of duty as regulating the relation of superiors and inferiors, predominating in the feudal and ecclesiastical institutions of the middle ages, usurps a controlling influence in the mediæval notion of sovereignty. The combination of power and duty in the conception of sovereignty has been accomplished by modern thought; which recognizes the organized determinate sovereign as well as unorganized society's power to reorganize itself.

SOVEREIGNTY AND NATURAL LAW—LEGAL SOVEREIGNTY.

Even during the Middle Ages the orthodox ecclesiastical idea, attributing the origin of the State to sin and the devil, so that it might be legitimized, hallowed, and brought under the control of a divinely ordained church, was subjected to continual refutation by ancient political conceptions. At length States were again referred to nature and compact by Aquinas and Marsilius, and the divine will, though still retained, became the *causa remota* of the State's existence. All power is from God, was still asserted, but its interpretation had changed; it no longer referred to the power of rulers, but to that of the community. Mediaeval scholasticism at length gave way to the humanism of a new era. After centuries of desuetude, the heathen political philosophy of the ancients was again brought forward.

The conception of the State at the time of the Renaissance, especially as we find it in the works of Machiavelli and Bodin, is a direct outcome of the ancient conception, but begins to deviate from that conception. It was in Italy that preserved in a far greater degree than in any other part of Western Europe the traces of ancient culture and civilization, and

it was in Italy that the modern study of politics began. To Machiavelli the State is the highest kind of existence, the noblest production of the human spirit. His political aim is in its safety and order, and his only political standard is utility to the power of the State. In his works is exhibited the real nature of that species of sovereignty which the Greeks call tyranny, and which, modified in some degree by the Feudal system, reappeared in the Italian commonwealths. In freeing political science from the thrall of theology, and in distinguishing public law from politics, Machiavelli rendered signal services to political philosophy (1). The details of his statecraft are as foreign to our present purpose as the endless controversies concerning his literary object, and as the strictures upon an immorality belonging to the age rather than the individual.

With the Reformation, theocratic doctrines in politics are again energetically revived. With all their divergencies—Luther, Melancthon, Zwingli and Calvin agree in asserting the Christian aim and the divine nature of political authority. It is the most pronounced opponents of the Reformation, and in particular the Jesuits, who first produced the modern purely secular theory of the State. Among them Bellarmin, Suarez, Boucher and Mariana find its origin in natural law (2); they all alike clothe the community with supreme power and refer to its will the

(1) Cf. Macaulay, Essay on Machiavelli.

(2) Cf., Otto Gierke, Johannes Althusius ŭ die Entwicklung der naturrechtlichen Staatstheorien, pp. 65 and 66. Hallam, History of Literature, Vol. III., p. 355.

rights of its ruler. No individual but the community, Suarez maintains, is sovereign, and not the individual will but the will of the community produces sovereignty, for neither have the individuals the power of sovereignty previously, nor could they have prevented that free union, dictated by natural reason, which gave birth to political authority. All power is from God, only as nature and natural law are emanations of His being.

With the consolidation of the French monarchy and the development of a national consciousness Jean Bodin (1) sought a scientific support for that absolutism by which alone it was then possible to govern France. Defining the State as a lawful government of many families and their common possessions by a sovereign power, and thus emphasizing, instead of Aristotle's ethical aim of a good life, the legislative policy of the sovereign, he becomes the founder of the modern theory of the State; by a searching analysis of the fact of government, he formulates a new conception of sovereignty. The fundamental proposition of Bodin is that in every independent community governed by law there must be some authority whereby the laws themselves are established, and which must, therefore, be above them; some power to which all other powers of the State are subject, and which itself is subject to none. This authority, possessing absolute power, is sovereign, and is the test of an independent State.

(1) Bodin, Republica, Bk. I., chap. 1. *Cf.*, H. Baudrillart Bodin et son Temps.

Bodin's expression of the legal supremacy of the State reflected a change then taking place in the face of Europe. The mediæval system of Europe was a collection of groups, held together by ties of personal dependence and allegiance, and connected among themselves by ties of the same kind. The laws and customs obeyed by princes and people were not thought of as depending upon the local government, but the Roman law was regarded as of intrinsic and absolute authority. "The old unity of the clan had disappeared and the unity of the Imperial institutions served to bridge over in the interval in which gradually and slowly the newer unity of the nation was developed."

Sovereignty is the most high, absolute and perpetual power over citizens and subjects in a State, itself not subject to the laws, but maker and master of them (1). The supreme power cannot be subject to control or condition, since who should limit it and not be himself sovereign? It can neither be delegated nor alienated in part, since its very nature will not permit of partition. Is not, then, the greatest sovereign subject to the laws of God and of nature? As an individual a sovereign prince cannot abrogate these without committing high treason against heaven, but he is answerable to Almighty God alone, and his subjects have no lawful power to condemn him (2). Neither the laws of nations nor those of his own predecessors are binding upon a sovereign.

(1) Bodin, I., 10.

(2) Id. II., 5.

He is bound only in moral duty and in honor by his conventions with other princes and with his own subjects. Recollecting certain organic laws so closely associated with the very nature of some particular sovereignty that they cannot be abrogated by the sovereign power itself, and certain fundamental institutions of society with which even sovereignty durst not meddle, Bodin refuses to carry his con ception to its logically consistent conclusion.

The power to give laws to all subjects in general without the consent of anyone is the chief mark of sovereignty (1). He who receives law or orders from another by force or by contract is in nowise sovereign. Law depends upon the will or pleasure of the sovereign binding all his subjects, but not himself; it receives its force from the command of the sovereign. Bodin thus distinguishes legal obligation from purely moral duty on the one hand, and from those duties created by convention on the other. This is a great step towards the separation of the legal from the ethical sphere of thought in political science.

Monarchy, aristocracy and democracy are States in which one, a minority, or the majority, exercise sovereignty; no mixed State is possible, as sovereignty is by its nature indivisible. There is a great distinction, Bodin points out, between the State and the Government, and no necessary connection between them (2). Before the institution of States

(1) Id. I., 8.

(2) Id. II., 5.

every head of a family was supreme in his own house, but force and ambition soon armed men against each other, and the vanquished became the slaves of the victorious chief, who in peace contrived also to keep in his command as faithful and obedient subjects those by whom he had been chosen captain for the prosecution of war (1). Thus the full measure of liberty, given by nature to every man, to live as he himself best pleased, was completely wrested from the conquered; and thus too the liberty of the conquerors was curtailed by obedience to a chosen chief (2). This obedience was rendered in return for justice and defense, but he who would not abate any of his liberty lost all. The sovereign's power to enforce obedience and the citizen's duty to obey are here combined. It was thus that Bodin unconsciously engrafted legal upon political sovereignty—sovereignty by force upon sovereignty by right—and amalgamated into one consistent theory the essential elements of ancient and of mediæval doctrine.

The State is a complete union of freemen, who join themselves together for the purpose of enjoying law and for the sake of common welfare (3). Thus Hugo Grotius defines the State which he bases upon human nature, *hominis proprium sociale.* The social instinct is the source of that justice which teaches us to fulfill our promises, since indeed some method

(1) Id. I., 2.

(2) Id. I., 10.

(3) Grotius, De Jure Belli et Pacis, Prolegomena, §§ 6, 8, 15 and 16.

of obligating men to one another is necessary and no other is conceivable. From the inviolability of promises Grotius derives civil rights. Those who join themselves to any society or subject themselves to any man, do so by express promise or by the nature of the transaction are to be understood as promising to acquiesce in what the majority of the society or those to whom power is committed shall determine. An association in which many come together to form one people or State is a most perfect society, and naturally gives the highest right to the body over all its parts (1). Brought together by will, however, the right of the body politic over its component parts must be determined by that primeeval will, and this of necessity limits the public power. Should a people, however, subject themselves to a ruler without conditions or be subjugated in a just war, he is then supreme and they are not at liberty to control him, even though he should abuse his power (2). In making the tacit consent of men to comply with the will of the majority or of the ruler the source of public law Grotius furnished a ready fiction to explain the origin of the State and of law, and suggested a line of thought which forms the basis of that theory whose fundamental idea is that the State is the arbitrary work of individual contract. Ancient theories of the State begin with the State itself. This modern contract theory begins with the individual. The ancients did not sufficiently regard

(1) Id. Bk. II., c. 5., 23, 6, 4.

(2) Id. I., 3.

the rights of the individual. These moderns have committed the opposite error of ignoring the full significance of the State as a whole.

Thomas Hobbes, born in the year of the Spanish Armada, died within ten years of the English revolution of 1688, and experienced within the limits of his thinking life that whole series of events that raised the question of the limit of authority within a State and made it the foremost question of the day in England. "He studied philosophically the civil wars of Charles the First and calmly expressed what seemed to him the argument for royal authority entirely free from popular control." His arguments are summed up in the "Leviathan"(1), first published in 1651, when the experiment of Commonwealth was being tried in England. Like Bodin, Hobbes expressed the then prevalent absolutist theory regarding the State, as essentially the sphere of power of a superior, and identified the Government with the State. Hobbes, indeed, accepted Bodin's principle of sovereignty, and following out the line of thought indicated by Grotius, bolstered this up by a theory of the origin of society based upon contract. He gives an elaborate account of the construction of the State by an original covenant between its members. This imaginary covenant, modified in its terms and circumstances, according to the conclusions which the particular author sought to establish, becomes the controlling theory for the next two centuries; and seized upon as a watchword by the enthusiasm of

(1) Cf., chaps. 18 and 21.

Rousseau, it "grows from an arid fiction into a great and dangerous deceit of nations." Far from being a disciple of Grotius, however, Hobbes may perhaps be said to have formed his theory in antithesis to the view of natural law revived and extended by Grotius and his contemporaries. Indeed, Hobbes and Spinosa fixed upon natural law a new meaning and one which the English school of analytical jurists have most logically developed. Hobbes may be said to have substituted the dictates of reason conducing to self-preservation (which he terms the law of nature) for the *jus naturale* of the Roman jurists, a combination of the Greek equality, meaning justice, with the Prætorian *jus gentium*. It is this substitution which best accounts for the discrepancy between English and Continental theories, between Rousseau on the one hand and Bentham on the other.

All men are by nature equal, and a state of nature (1) is one in which "competition," "diffidence" and "glory" lead men to invade and destroy each other. It is a state in which there is no assurance of a disposition to peace, and therefore a state of war of every man against every man, in which the notions of right and wrong, justice and injustice have no place since there is no common power, and consequently no law; a State in which private appetite and the passions of the individual are the measure of good and evil, for these signify but our appetites and aversions. Fear of death and the desire of a

(1) Leviathan, chap. 15.

more commodious life incline men to peace. For these reasons men who naturally love liberty and dominion over others inaugurate that system of restraint upon themselves under which they live in States; create a power able to overawe them all, so that the fear of punishment may operate to enforce the theorems of moral philosophy (the maxims of an enlightened selfishness), and to hold men to the performance of their covenants, which, so long as there is danger of non-performance on either side, are invalid by that law of nature which dictates self-preservation. "The only way to erect a common power among men, is to confer all their power and strength upon one man or upon one assembly of men that may reduce all their wills into one will; which is as much as to say to appoint one man or assembly of men to bear their persons, and every one to own or acknowledge himself to be the author of whatsoever he that so bears their persons shall act or cause to be acted in those things which concern the common peace and safety, and therein to submit their will, everyone to his will, and their judgment to his judgment. This is more than consent or concord, it is a real unity of them all in one and the same person, made by a covenant of every man with every man, in such manner as if every man should say to every man: I authorize and give up my right of governing myself to this man or to this assembly, on the condition, that thou give up thy right to him, and authorize all his actions in like manner. This done, the multitude so united in one person is called the Commonwealth. This is

the generation of that great 'Leviathian,' or rather to speak more reverently of that mortal god to which we owe, under the immortal God, our peace and defence" (1).

"And he that carrieth this person is called Sovereign, and said to have sovereign power, and everyone besides is his subject (2)." The single sovereign authority created by this transference by all individuals of their barren common rights to everything in the state of nature, is most absolute and irresponsible, and his power is irrevocable. This follows from the transfer of rights, not several, but the result of a social covenant of all the subjects by which one has covenanted to every other that his natural rights shall be and remain transferred to the sovereign. The assent of the sovereign and of all these subjects may, indeed, determine the sovereign's right, but only on the penalty of again lapsing into the anarchic state of nature. The sovereign owes his subjects no duties, since the contract is in no sense between the sovereign who takes up these rights and each or all of the individuals who resign them; it is between man and man, of these latter only, who are ever bound to one another to allow whatever the sovereign does. The sovereign may commit iniquity but not injustice, and cannot be deprived of power or punished, since there is no one with jurisdiction over him. Hobbes was seeking a basis for sovereign and not for popular rights, and it was natural that

(1) Id, 17.

(2) Id. 18.

he should negative that social contract, between the individuals and society, already enunciated by Hooker and afterwards more definitely formulated by Locke.

The sovereign is judge of what opinions and doctrines are adverse, and what conduce to peace, since the actions of men are produced from their opinions. The State must be at the same time Church, if it is to continue State; and the sovereign, having the supreme power under God, represents God, and is chief pastor as well as chief ruler. A distinction must be made between man's acts and his opinions. It is impossible that the State, by any machinery of instruction or penalties, should control the thoughts and feelings of the subjects, but it is nonsense for a subject, with freedom of thought untouched, to claim to override the sovereign's command on grounds of conscience.

Though nothing the sovereign can do to a subject can properly be called an injustice, since every subject is author of every act the sovereign does, there are things which, though commanded by a sovereign, the subject may yet, without injustice, refuse to do. These consist in those powers or rights of the individual man, which he cannot surrender by any covenant. Thus, no man can be bound to kill himself, to abstain from self-preservation, or to accuse himself, and the obligation of subjects to a sovereign lasts no longer than the power to protect them. Other liberty depends on the silence of the law. In cases where the sovereign has prescribed no rule, the subject has liberty to do or forbear according to

his own discretion. Liberty belongs not to the particular man but to the State, and is that liberty which every man would have had if there were no civil laws and no State.

"Law is not counsel but command of him whose command is addressed to one formerly (already by having agreed to be his subject) obliged to obey him. Civil Law is to every subject those rules which the State has commanded him by sufficient sign of the will to make use of for the distinction of right and wrong, of what is and what is not contrary to the rule." The sovereign is the sole legislator in all States, and having power to repeal the laws, is not subject to Civil Law. Customary law depends for its force on the will of the sovereign signified by his silence, since custom continues to be law only so long as the sovereign acquiesces therein. "It is not any private reason nor the artificial perfection of reason gotten by long study, observation and experience, but the reason of that artificial man (the State) whose command makes law." The interterpretation of the law of nature is the sentence of the judge, constituted by sovereign authority, and consists in its application to the case in hand.

The definition of legal sovereignty and of legal obligation and the distinction between legality and policy were the main advances made by Hobbes. His English followers endeavored to avoid his consequences by devising a different sort of an original contract as the assumed foundation of society.

Baruch Spinosa sought to vindicate more expressly than Hobbes had done the right of a subject

to liberty of thought and improved greatly on the theory which he in the main accepts. "I start," says Spinosa in the preface of his Theologico-Politi-cal Treatise, "from the natural rights of the individual, which are co-extensive with his desires and power, and from the fact that no man is bound to live as another pleases but is guardian of his own liberty. I show that these rights can only be transferred to those whom we depute to defend us, who acquire with the duties of defense the power of ordering our lives; and I thence infer that rulers possess rights only limited by their power, that they are the sole guardians of justice and liberty, and that subjects should act in all things as they dictate; nevertheless, since no one can abdicate so utterly his own power of self-defense as to cease to be a man, I conclude that no one can be deprived of his natural rights absolutely, but that the subject either by tacit agreement or by social contract, retains a certain number which cannot be taken from him without great danger to the State. * * * I then prove that the holders of sovereign power are interpreters of religious no less than of civil ordinances, and that they alone have the right to decide what is just and unjust, pious and impious; lastly, I conclude by showing that they best retain this right and secure safety to the State by allowing every man to think what he likes and say what he thinks."

Spinosa, in answer to a correspondent (1), thus explains the difference between his own political

(1) Epistle 50.

theory and that of his master Hobbes: "I ever save natural right harmless and hold that the sovereign magistrate has no more right over his subjects than is measured by the excess of his power over theirs." Sovereignty is thus made the right which arises and is determined by the power of society over the individual, and since each individual is powerless against the united force of the rest, he has no more right than society chooses to leave him. They to whom affairs of State are entrusted by common consent have therefore the right of imposing their will upon the citizens so long as they maintain the power of enforcing it. Accordingly, those who reign over their subject's minds have most dominion, for man is then most under the government of another when he of full consent determines to observe all that other's orders. In this idea of Spinosa the habit of obedience, made the test of sovereignty by the English school of analytical jurists, is closely foreshadowed. No government is really absolute, since its power is limited by the endurance of its subjects, and although it is superior to its own laws, it may offend against natural law by causing its own destruction. If men could so far lose their natural right as not to be able to do anything without the will of another, governors might without remedy use all extremities of violence toward their subjects. But it must be allowed that every man reserves to himself much of his own right, and this depends on no other man's resolution but on his own alone.

To Spinosa might is right. It is in accordance with man's nature for him to exercise his powers,

and being natural it is right (1). This extreme conception of an absolute sovereignty led Spinosa to the recognition of a sphere of immunity for the individual—a sphere in which the individual is absolute, and on which the sovereign cannot trench because of the impossibility of its exercising any control therein. It is but another corollary of this dogma of force that as no sovereign can ever cope with the resistance of an intelligent people, the people has a residuary sovereignty. To use modern terminology, Spinosa sees that the people are the political sovereign in any political system, no matter who are the bearers of the legally supreme command. To emphasize and develop the conception of legal sovereignty were the services which Bodin and Hobbes rendered political science; and accepting this conception, Spinosa shows that there is another and a greater sovereignty resting upon the same principle upon which the former is itself based, by which it is both sustained and limited. This distinction between force and duty is perceptible throughout the whole development of political philosophy. Hobbes is the apostle of duty, his maxim, right becomes might; Spinosa the apostle of force, his maxim, might makes right. Starting with the rights of individuals, Hobbes deduces the rightful institution of the sovereign, and this he finds compatible only with absolute power. The rights of all individuals except the sovereign having been abrogated in favor of the latter, and the right of the sovereign

(1) Tractatus Theologico-Politicus, XVI., 1-5.

alone remaining, it is the source of his authority and his might. To Spinosa, wherever might is there is right, according to the immutable laws of the universe; the legal sovereign, the highest organ of control, rightfully exercises what power it can and no more. It is, however, subject to the greater power of the people, constituting a right in the latter to control the former.

SOVEREIGNTY AND THE POPULAR WILL—POLITICAL SOVEREIGNTY.

It was a necessity felt by those Englishmen who had accomplished the revolution of 1688, for a theory to justify it, in the face of the doctrinaire divine right of kings, deeply rooted in the popular mind, that caused John Locke to develop a social contract and by the application of a conception of sovereignty to give theoretic support to the supremacy of the popular will (1). In the discussion of sovereignty and the popular will, the idea of political sovereignty —which was the necessary result of sovereignty as limited by actual physical power in the philosophy of Spinosa,as opposed to that legal sovereignty whose greatest expounder was Hobbes — a sovereignty of the people, who are always irresistible and irrepressible, in the last instance is developed. The power of the people gives rise to a right which is above, beyond, and back of that legal sovereign, the ultimate embodiment of legality, existing in every State, and which in last analysis is but a right, gathering about itself and maintaining itself by the might of the ultimate popular power of a politically

(1) Locke, Second Essay on Government, 95.

conscious community. It is not at all strange that in thus emphasizing the interminable intestine struggle between right and might, between authority and anarchy in every community, theorists were betrayed by those maxims of policy which they found must be observed by every legally sovereign government which will not offend its political superior and commit political suicide. Losing sight of that conception of sovereignty which the keen analysis of Bodin had discovered, they made these maxims limitations on the absolute right of the legal sovereign.

The "judicious" Hooker had referred the origin of government "to deliberate advice, consultation and composition between men who in nature considered by itself might have lived without public regiment." The state of nature, as conceived by Locke, is accordingly not the state of war of each against all, which Hobbes makes it, but one in which men are free to order their actions as they think fit, subject only to the law of reason which teaches mankind that, all being equal and independent, no one ought to harm another in his life, health, liberty or possession. The characteristics of this State are the absence of any common judge with authority, and accordingly every one alike has the executive power of the law of nature. "Because no political society can subsist without having in itself the power to preserve the property, and in order thereto to punish offenses of all of the society; there and there only is political society where every one of the members hath quitted his natural power

(of judging and punishing breaches of the law of nature in the preservation of his life, liberty and estate against the injuries and attempts of other men) and resigned it into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus, all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent and the same to all parties" (1). The right of a majority to be the ultimate source of power in a political society is deduced as a practical necessity, without which the State could not act as one body at all; and the act of the majority passes for the act of the whole, and, of course, determines, as having by the law of nature and of reason, the power of the whole. The cession of each individual's power to the community is for specific purposes only. The sovereignty is not absolute but limited to the end for which it was conferred by the individuals, and extends no farther than is necessary for the mutual preservation of the lives, liberty and estates of them.

Locke's is a socio-governmental contract (2) with two stages: the perpetual and irrevocable agreement to live in a civil society, and the agreement by which a particular form of government is established, including the contract between ruler and people which is subject to revision whenever the public good de-

(1) Id., 168.

(2) Id., 149, 169, 171 and 172.

mands, and which may revert to the society to be again disposed of. Under every form of government the community thus retains the supreme power of self-preservation, a power which underlying all positive institutions and not bound by any of them can never become active until the government is dissolved (1). This power Hobbes would have dismissed as a specious name for the *de facto* possibility of a successful revolution, followed by return to the natural state of war and anarchy which is to be avoided at all costs.

Political power is, according to Locke, the right of making laws, with penalties attached, for regulating and preserving property, and employing the force of the community in the execution of such laws and in defense of the State. While the government subsists the legislative is the supreme power, since what can give laws to another is necessarily superior to him, and to it all members of the State owe obedience. It is, however, a fiduciary power and must be exercised for the good of the subject; it must dispense justice by standing laws and authorize judges; must not raise taxes on the property of the people without their consent. These organic maxims of government can, under no circumstances, according to Locke, be dispensed with. We should now say that these are rules of political expediency rather than limits to the legal sovereign's authority.

Thus Locke swallowed up legality in policy as Hobbes had swallowed up policy in legality. Hobbes

(1) Id., 243.

had made legal supremacy the final and conclusive standard of political ethics. Locke restored the ethical element by working the law of nature into his theory by means of an original contract of ruler and people.

"In considering man as he must have come from the hands of nature;" writes Jean Jacques Rousseau, "I behold an animal less strong than some, less active than others, but upon the whole, an organism having the advantage of them all. I behold him appeasing his hunger under an oak, slaking his thirst in the first brook, finding a bed at the foot of the same tree that furnished his repast, and there you have all his cravings satisfied" (1). Not because of any intolerable evils of this state of nature but by *quelque funeste hasard*, or, as Rousseau elsewhere explains, in some happy moment this noble savage solitary, unconventional and unconstrained—a striking contrast to Hobbes' ruffian primeval, nasty, brutish and short-lived—gives up his glorious birthright of natural liberty and unlimited right to all which tempts him and to which he can attain in exchange for that unnatural condition of a citizen, of social liberty limited by the general will of the community, and exclusive property in all those things of which he is possessed, and a moral liberty, rendering him truly master of himself. Force is physical power and no morality results from its effect. If it is necessary to obey by force, there can be no necessity to obey from duty.

(1) Discours sur l'origine de l'inégalité.

As no man has any natural authority over the rest of his species, and as power does not control right, the basis of all lawful authority is laid in mutual convention. If the social contract is not admitted, I recognize nothing belonging to another but what is useless to myself, and I owe nothing to him to whom I had promised nothing. Rousseau accordingly proposes to find a form of association which shall defend and protect, with all the strength of the community, the persons and goods of each associate. The social contract is a solution of this problem. It is in purporting to create a common and sovereign power and yet leave every contracting party as free as he was before, owing obedience only to himself, that Rousseau's social contract is distinguished from that of other theorists. This paradoxical impossibility is accomplished by the total alienation of all the associates and of all their rights to the community: *Chacun se donnant à tous ne se donne a personne.* Each of us puts into the common stock his person and all his power under the direction of the general will; and we receive in our turn the offering of the rest, each member, as an inseparable part of the whole. The act of association contains a reciprocal engagement between the public and individuals, and each individual contracting, as it were, with himself, is engaged under a double character, as part of the sovereign power engaging with individuals, and as a member of the State entering into compact with the sovereign power.

Thus is produced a moral collective body, the body politic, which derives from this act its unity,

its *ego*, its common personality, its life and its will. To prevent the social pact from becoming a vain form it tacitly comprehends an agreement that whoever refuses to obey the general will should be compelled to do so by the whole body. He is thus forced to be free (1). Sovereignty is the universally compulsive power of the State, directed by the general will; its object is to dispose each part in a manner most convenient to the whole. The general will differs from the will of all; the latter is but a collection of the particular wills of individuals and regards private interests, but the former consists in the common interest which unites all individual wills, and is arrived at by subtracting from the sum of particular wills those portions which oppose and destroy each other. The sovereign power thus determined, being but the exercise of the general will, is not bound by its own acts; there neither is, nor can be, any fundamental law obligatory on the whole people (2). Will can not be alienated nor divided, sovereignty is inalienable, indivisible, and can be represented only by itself, since power but not will may be transmitted, represented and divided. The sovereign, being composed of those elements which make up the multitude, can have no interest contrary to theirs, and by its nature so long as it exists must be everything that it ought to be. By the social compact the individual only alienates such parts of his power and liberty as can be of

(1) Le Contrat Social, I., 7.

(2) Id, II., 1; III., 15.

use to the community, and the sovereign cannot require anything of the subject that is useless to the community. This would be unreasonable. The sovereign is the only judge of importance to the community, and the citizen is bound by every authentic act of the general will.

A law is an act of sovereignty. It rests upon the social contract, and in submission to it each subject obeys only his own will (1). On close examination Rousseau's "general will" proves to be but the will of a greater or smaller majority of the voters who compose the sovereign, rendered under such conditions of voluntary co-operation that it necessarily bears along with it the tacit though real assent of the apparently opposed minority. The law becomes such because the majority desire it specifically and the minority compendiously, since they in common with the whole body of citizens desire the maintenance of the principle of majority rule (2).

Rousseau does not fail to see that the complete exercise of sovereign power, according to his notion of it, is impossible, or at least impracticable. How could the sovereign people all come together? His answer is that modern States are much too large, and he would restore the independent Greek city. Sovereignty belongs only to the whole people which cannot govern directly. The government or supreme administration is not sovereign, but a mediator between the subject and the sovereign, be-

(1) Id. II., 6; II., 4.

(2) Id. IV., 2.

tween the community in its corporate and sovereign capacity and its individual members as subjects. It is charged with the execution of sovereign laws and the maintenance of civil and political liberty. It is instituted by a sudden conversion of the sovereignty into a democracy without any sensible change, and only by means of a new relation of all to all. The citizens, having become magistrates, pass from general to particular acts, and from law to its execution. Any form of government prescribed by law must be established in due course by the democracy thus established. The acts by which the people profess submission to their governors are not contracts; there is but one contract in Rousseau's theory, namely, that by which society is constituted. Rulers act as officers of the sovereign, exercising in its name the power it has placed in their hands, and this power the sovereign may limit, modify or resume whenever it so desires. The alienation of the right to do so would be incompatible with the nature and the existence of the State. All governments, however, aim at usurping sovereignty; the ruler subjugates the sovereign, and the fundamental pact of society is broken.

However absolute the general will is in theory, Rousseau too recognizes that it has practical limitations (1). Such are those most important of all laws, engraven not on brass or marble, but in the hearts of the people, forming the real constitution of the State and keeping alive the original spirit of their

(1) Id. II., 7 and 8.

institutions. Manners, customs and public opinion are the boundaries of sovereign power. It is in this respect that Rousseau approaches and yet differs from his great critic, Burke, who regards historical institutions and the historical constitution which a people has developed as the real social compact of that people, as an expression of its general will, its common consciousness. This historical constitution is to Burke more binding and more lasting in theory as well as in fact than any paper constitution, or than any figmentary contract which was ever constructed. Marsilius of Padua, long before the modern era, had distinguished in every State an *universitas civium* and a *pars principans;* the former the sovereign law-giver, and the latter existing *per auctoritatem a legislatore sibi concessam, secundaria et quasi instrumentalis seu executiva pars.* This is in fact the sum total of the theory of Rousseau, and it is to sustain these propositions by that rationalistic mode of reasoning which was as much the mode of his century's thought, as evolution is that of our own, that he is at the labor of developing his social contract.

Any liberty is better than Hobbes' despotism, and any despotism better than Rousseau's liberty. It is a mistake, however, to term Rousseau's words the "mere insensate ebullitions of a fanatic;" they are of the utmost importance in political theory, and forming the bible of the French people from the Declaration of the Rights of Man to the Constitution of 1793, they had a lasting effect on the course of history and the destiny of mankind. Rousseau's

permanent contribution to political thought was the development of a conception of the absolute and irresponsible political sovereign back of all government. The history of France, the history of Europe and of America, have justified the theory and the utterances of Rousseau. The majesty of the sovereign princes of Europe has departed, and the public opinion of an enlightened people is the crowned political sovereign of our time.

Legal right, according to Immanuel Kant, is just the whole compass of the conditions on which the independent will of one can be united with the independent will of another, according to a universal law of freedom (1). The great problem of law is to keep self-conscious beings from coming into collision with each other; such a collision is avoidable only so far as their acts are in accordance with universal rules. All acts which do not correspond to such rules are acts in which the agent is not in harmony with himself as a rational subject; and according to the universal laws of freedom such acts should be restrained or annulled, since such a use of freedom by one is a hindrance to freedom according to universal laws, and compulsion opposed to it is but hindering the hindrance of freedom (2). I am not bound to leave inviolate the property of another if others do not make me secure that they

(1) Kant, Die Metaphysische Anfangsgründe der Rechtslehre, Ed. Rosenkranz, Vol. IX., § 53 and § 45. Ein Staat ist die Vereinigung einer Menge Menschen unter Rechtsgesetzen. *Cf.* Caird, II. Critical Philosophy of Kant, pp. 321 et seq.

(2) Kant, id. IX., p. 34.

will refrain from violating mine on the same principle. This reciprocal securing of each other's rights does not require a special legal act, but is involved in the conception of an external legal obligation; since a universal obligation as such is reciprocal. Special obligations rest on rational principles of will and not on any express or implied contract (1).

No one-sided will, that is, no individual will, can be entrusted with a compulsory power to be exercised against all alike. This would be inconsistent with the freedom of each enjoyed under universal laws. Therefore a will which binds every one equally, a collectively universal will, armed with absolute power, can alone give security to each and all. The state of those under universal external legislative will, armed with power, is the civil state. The state of nature is a state of anarchy and of violence to all. Any violence necessary to establish a civil society is violence used to counteract the violence of a natural state, and so is consistent with freedom. The State is a means to free the individual from himself as well as to protect him against the possibilities of enslavement by others. It can discharge this function only as the outward minister of justice which forces men to be free, and it is going beyond its office if it attempts to do more. A right of revolution or a right to break up the State and fashion it anew cannot exist, since it would be a negation of all rights and an outrage on justice itself.

(1) Id. IX., 64.

The origin of the highest power is for the people inscrutable, since in order to have a rightful authority to judge the highest power in the State, the people must already be united under universal legislative will, and it can and ought not to judge otherwise than this supreme governor wills (1). Kant agrees with Hobbes in holding that the indvidual has no right but only duties towards the supreme power of the State. The highest power of the State is above the arbitrary will of the subject, and is sacred and inviolable, independently of the particular form of the political society. The true ethical form of the State is republican; and the sovereign is under a moral obligation to bring the State into harmony with this ideal form. In like manner the sovereign is under a moral obligation to enact every law needed for the maintenance of law and order, and no law the sole purpose of which is the happiness of the people. The proper function of the State is to maintain the existence of the State, and not to make people happy against their will (2). A State, even of the lowest type, is an order in which the universal will is maintained against the particular wills of the subject, and, as such, it is the subject's absolute duty to support it, and thus to prevent society from relapsing into a state of nature.

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(1) Id. IX., 161.

(2) Id. VII., 209.

THE HISTORICAL SCHOOL.

The State is the organic manifestation of the people in history. This is the true spirit of the theorists as opposed to those of the deductive and *à priori* school, of those who appeal to experience against dogmatism, and whose work it was to apply an antidote to the vicious fictions of those who sought in contract, the basis of political philosophy. Montesquieu is the father of modern historical research; he was the first in modern times to "look upon the epoch-making principle, that the course of history is, on the whole, determined by general causes, by widespread and persistent tendencies, and by broad and deep undercurrents of thought." It would, perhaps be extravagant to maintain that the *Esprit des Lois* "has given more impulse to political thought than any other work that has appeared in Europe"; but it is certainly true that its influence in pointing out a new method of justifying the existence of the State, has been enormous, and is still active to-day. Montesquieu aimed at constructing a comparative theory of politics and law, based on a wide observation of actual systems of different lands and ages. The idea was entirely new. He saw that the institutions of the society depend on its particular conditions

and must be studied in connection with them. But he overrated the modifying effect of environment to the neglect of the hereditary rational element "Law in general," he said, "is human reason, and the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied; they ought to be adapted to the nation where they are made, and it is, therefore, unlikely that those of one nation should be proper for another. They ought to be conformed to the nature of the various governments, to the climate, manner of living, degree of liberty and religion of the people" (1).

Edmund Burke was a Whig, and gloried in the Revolution of 1688; but becoming alarmed at the excesses of the French Revolution, he leaned to the side of conservatism. Naturally disinclined to theorizing, he declared himself resolved not to be wise beyond what is written in legislative record and practice. Believing in the respect due to the continuity of the present with the past and in those associations which cannot be replaced, he looked upon the analysis of the ultimate forces of society as a kind of sacrilege (2). To Burke, as to Aristotle, the state is a natural institution. To speak of man in the so-called state of nature is a contradiction in terms. Man is by nature reasonable, and his natural condition is one in which reason predominates and can

(1) Esprit des Lois, Book I., 1.

(2) Appeal from the New to the Old Whigs, III. Works, p. 109. Reflections on the French Revolution, IV. Works, p. 460.

best be cultivated. Art is man's nature, and society, though it be artificial in its perfection, is more truly a state of nature than a savage and incoherent mode of life. The foundation of government is laid in a provision for our wants and in conformity to our duties; it is to purvey for the one; it is to enforce the other. This can only be done by a power out of ourselves. That he may obtain justice, man gives up his right of determining what it is, in points most essential to him; that he may secure some liberty he makes a surrender in trust of the whole of it.

In all forms of government the people is the true legislator, and whether the immediate or instrumental cause of law be a single person or many, the remote and sufficient cause is the consent of the people, either actual or implied. What, then, are the people? A number of vague, loose individuals are not a people? Neither can they make themselvs one by off-hand convention. "A multitde told by heads is no more a people after than before it has been told." The corporate unity of a people is artificial, and the power of the majority to bind the whole is one of the most violent fictions of positive law. The people, all, or a majority, have no inherent right to exercise any of the authority of the State. Whether a majority shall have power to decide and in what cases is an affair of convention, to be implied from historical precedent and prescriptive right. Civil society is that social discipline which time, thought and experience have produced.

"Burke restored history to its place in politics, but he left no disciples. The formal development

of political science in the present century is not traced to him, but it is taken up in England from a wholly different side, and on the Continent by an independent impulse, though in spirit and sometimes even in form having many affinities with Burke" (1).

After the fall of Napoleon, the spirit of the French Revolution, which scorned everything historic and preferred to strive blindly for indefinite and universal perfection, suggested to the Germans the enactment of a common code as the best means of crushing out French influence, of saving the disjointed segments of the Austrian Empire from anarchy and of unifying liberated Germany. "With the common code the people will be prosperous and the national character freed from local peculiarities, will be broader and freer." "Law is made to triumph over the habits and inclinations of men and to correct and influence societies." In opposition to this view of law, in a treatise entitled, "Vom Beruf unserer Zeit fur Gesetzgebung und Rechtwissenschaft," Savigny set forth the principles of the historical school. Law is neither the arbitrary will of the prevailing force in a community, nor an abstract absolute rule of conduct manifesting itself under the same form in all places and at all times, but it is one of the forces of society, with which it changes according to fixed and certain laws of development. The law of each country is a part of its body, and not a mere fanciful garment which can be changed

(1) Pollock, History of Politics.

with the changing whim of the moment. A people is an invisible natural whole and never exists without its bodily form, the State, the creation and development of which is the highest function of law.

The general idea of the historical school is best summed up in the aphorism that institutions are not made but grow. The British constitution and the English common law are good examples of the organic growths emphasized by this school. It is the political sovereign as opposed to the legal sovereign, the sovereign behind as contrasted with the sovereign in the constitution, public opinion as opposed to government, which Burke and Savigny bring to the foreground. To them the State and its law are aspects of the total common life of the nation, not something made by the nation as a matter of choice or convention, but like its manners and language, bound up with its existence, and indeed helping to make the nation what it is. To both the organized people always appears to be the true legistator; and thus their political philosophy is based upon the data of primitive times, for it is only then that the people can be said to truly legislate. A speculative optimism characteristic of historical evolution is the danger to be guarded against in this historical political theorizing.

SOVEREIGNTY AND POSITIVE LAW.

After an interval of a century Jeremy Bentham took up the theory of legal sovereignty where Hobbes had left it, and by giving it a reasonable interpretation made it fruitful of practical consequences. From it he developed in outline the modern English theory of the State. Repudiating as anarchic and absurd the pretended natural rights upon which Rousseau, among others, based popular sovereignty, Bentham recognized and supported the ultimate political influence of the majority on the utilitarian principle of the greatest happiness to the greatest number. "The formula of the greatest happiness is made a hook to put in the nostrils of Leviathan that he may be chained and harnessed to the chariot of Utility."

To Bentham natural society was a negative; political society a positive idea (1). When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons of a known and certain description (whom we may style governor or governors) such persons altogether, subjects and governors, are said to be in a state of political society. In view of Maine's criticism, we note that Bentham

(1) Fragment on Government.

admitted the difficulty of deciding whether habitual obedience exists in a given community. Few if any are the instances of this habit being perfectly absent, certainly none of its being perfectly present. Absolutely perfect, till man ceases to be man, the habit of obedience never can be; it is more or less perfect in the ratio of the number of acts of obedience to those of disobedience. Practically, the mark of political society is the establishing of names of authorities, and the existence of people set apart for the business of governing and issuing commands.

Laws are commands of the sovereign. The field of his authority, though not infinite, must unavoidably unless limited by express convention be allowed to be indefinite, and hence unlimited. The effect of convention is to limit and confine the disposition to obedience within certain definite bounds. To discuss the power of an absolute sovereign is to discuss whether the acts of that power are useful or mischievous—so mischievous, in fact, that resistance is better than submission. Bentham despairs of finding any conspicuous signal when this juncture has arrived. The sovereign governs without any assigned superior check, but always at the peril of being overthrown if it appears to the majority of the subjects that resistance is better than submission. This distinction between the legal duty of obedience and the political doctrine of non-resistance is one of the great advances of Bentham and was wholly neglected by Hobbes. Bentham is guilty of a hopeless and irreconcilable confusion between the legal sovereign and the government.

The ruling power should be in the hands of the people, because the happiness of the people is the object of government, and the means of obtaining this object would thus be put into the hands of those who have the chief interest in realizing it. This doctrine of utilitarianism in politics is wholly bound up in the dogmatic assertion that the greatest happiness of the greatest number is the end of all government; that happiness except in a very limited sense is the end of government at all was denied by Kant (1), Mill (2), Spencer (3), and that host of writers upon the limits of the State whom Huxley (4) charges with administrative nihilism. Upon this doctrine Bentham bases the political sovereignty of the people, the duty of the sovereign to legislate, and his whole teleology of the State.

The advance of the followers of Bentham was in disregarding this principle of utility and in making the existence of the habit of obedience, the acknowledgment of authority by the community the basis of legal sovereignty. John Austin furthered the separation of the theory of legal sovereignty from the discussion of the ethical and historical foundation of the state. Though he allows the "greatest possible advancement of human happiness" as the end for which government ought to exist (5), and

(1) VII. Rosenkranz, Ed., p. 209.

(2) J. S. Mill, Essay on Liberty, American edition, 1863, pp. 182 and 183.

(3) H. Spencer, I. Principles of Sociology, p. 69.

(4) Huxley, Administrative Nihilism.

(5) Province of Jurisprudence Determined, Vol. I., p. 298.

asserts that, "were society adequately enlightened, its habitual obedience would exclusively arise from reasons bottomed in the principle of utility" (1); utility is not with Austin the mainstay of sovereignty, and is only important as the probable cause of that habitual obedience common to all societies, in which he finds the essence of sovereignty.

To Austin, as Amos remarks, the conscious establishment of the science of law must be attributed (2). The essence of a law, according to Austin, is that it is commanded or prescribed by a superior to an inferior (3). Superiority signifies might, the power of affecting others with evil or pain, and of forcing them through fear of that evil to fashion their conduct to one's wishes (4).

The bulk of a given society are in the habit of obedience to a determinate and common superior, which is itself not in the habit of obedience to a determinate common superior (5). The party truly independent is not the society but the sovereign portion of the society (6). Austin's theory is thus the complete antithesis of Rousseau's. According to Rousseau it is of the essence of sovereignty to belong to the whole, i. e., to the general will. According to Austin it is of its essence to be partial. Both

(1) Id., p. 301.
(2) Science of Law, p. 5.
(3) Austin, id. p. 88.
(4) Id. p. 99.
(5) Id. p. 226.
(6) Id. p. 243.

find sovereignty in will, Austin conceiving this will as necessarily inhering in a part, Rousseau as inhering in the whole of society (1). Austin's reason for limiting sovereignty to a part is that every law must be commanded, and that a command can proceed only from a person or persons capable of specific enumeration. This assumption is no less surprising than is the vicious circle detected in Austin's reasoning by Professors Dewey and Ritchie (2). "First the law is defined as a command set by the sovereign, then, having the benefit of this idea of sovereignty to help differentiate political from moral law, the sovereignty is defined as the power which sets law, the idea of determinateness being slipped in so incidentally as almost to canceal fundamental importance." A supreme power limited by positive laws being a contradiction in terms (3), every sovereign is free from legal restraints, *i. e.*, legally despotic (4). The sovereign is subject to neither obligation nor duty toward his own subjects or other sovereigns (5). Rights, like duties, are the creatures of law, and arise from the command of the sovereign in a given independent community (6). The will of the sovereign is the paramount standard

(1) *Cf.* Dewey, Austin's Conception of Sovereignty, Political Science Quarterly, March 1894.

(2) David G. Ritchie, Darwin and Hegel, with other Philosophical studies. *Cf.* Essay on the Conception of Sovereignty.

(3) Id. 73 and 259.

(4) Austin, id. p. 270.

(5) Id. p. 283.

(6) Id. pp. 408, 354, 458.

of right and wrong; law, the standard of justice, and justice the creature of law (1).

The position of the school of positive lawyers is thus summed up by Sir G. C. Lewis: "Persons are said to be sovereign or to possess the sovereign power when they yield no obedience to any person on earth, and when they receive obedience from the community which they govern. The independence of the State and the existence of government are both questions of degree to be decided according to the facts of each particular case. As long as government exists the power of the persons in whom sovereignty resides is absolute and unlimited over the whole community. The sovereign has the complete disposal of the rights of every individual and the power to modify the existing form of government When certain practices, though not legally binding, have been constantly observed, they are styled a constitution" (2).

The progress made by the school of positive lawyers was in accordance with the development of history. Originally sovereignty was identified with government, which was absolute, and it has been shown that the theory of sovereignty itself was developed from an analysis of government. Later, when government became limited by the people, who usurped a political sovereignty, the theory that government is absolute was still promulgated. The necessity for an intermediator between the govern-

(1) Id. p. 223.

(2) Lewis, Use and Abuse of Political Terms, p. 73.

ment and the political sovereign became patent. How was the unorganized sovereign people to exert its influence upon a government limited by it but claiming absolute power? To meet this need, a legal sovereign found in Hobbes was developed by Bentham. This legal sovereign soon found its counterpart in actual politics; constitutional conventions and amending powers became incorporated in our written constitutions.

SOVEREIGNTY AND SOCIOLOGY.

In opposition to that natural freedom and equality from which individuals were rescued by social contract, sociologists, "finding that the earliest and latest accounts represent mankind as assembled in troops and companies, maintain that man is by nature the member of a community, part of a whole." Considered in this capacity, he must forego his happiness and his freedom where they interfere with the good of the community. The theory is that all social action is essentially a "*kulturkampf*," growing out of antagonisms of heterogeneous social elements. The origin of law and the State, like that of the animal species, is to be found in the struggle for existence. Jurists have habitually theorized from law to the State. Sociology points out that the natural evolution is from horde life to the State, and from the State to law. Starting, not from the individual, but from the social group, this idea

"fasst den Staat als eine Mehrheit über- und untergeordneter socialen Gruppen auf, deren gegenseitiges Ringen in erster Linie die Erhaltung des Staates, in zweiter Linie eine solche Entwicklung desselben fördert, dass die Daseinbedingungen der einzelnen Gruppen mit den Daseinbedingungen der Gesammtheit in Einklang gebracht werden" (1).

(1) Gumplowicz Die Sociologishe Staatsidee.

Not in the spirit of the individual nor in a fictitious general will, but in the social elements of the State, in their mutual conflict and limitation, is to be found the source of public law. The origin of the State is the triumph of a group well organized for war over an unwarlike group. The essence of the State is a division of labor instituted and maintained by force among various social elements, which are united as members of a single whole. Sovereignty is the aggregated power of the community, directed to the conservation of the community in the midst of an elemental strife of unequal social groups. In last analysis, that dominant group which makes and modifies the law, and which controls the administration, is the holder of the sovereign power. The strongest social motive is self-preservation, and this dominant class can only preserve its authority by the preservation of the community, and this accordingly becomes its motive. The work of the sociological school is related to that of the historical. The permanent contribution of this school of political thought is an analysis of political sovereignty.

SOVEREIGNTY AND LIBERTY.

Anarchism as a scientific social theory was first elaborated by Prudhon (1). In a given society the authority of man over man is inversely proportional to the stage of intellectual development which that society has reached. Property and royalty have been crumbling to pieces since the world began. As man seeks justice in equality, so society seeks order in anarchy. Rousseau's premise that the people is a collective unity having a moral personality, distinct from that of the individual, is false.

Contract is the only bond which can unite individuals in society. All laws which I have not accepted I reject as an imposition on my free will. The idea of contract excludes that of government; it imposes upon the individual contracting parties no obligations but those resulting from their personal promise; it is not subject to any external authority; it alone constitutes the common law of the parties and awaits execution only from their initiative. The existence of the individual is the condition of his sovereignty.

As opposed to this school of anarchists, who find it necessary to overthrow authority in order to obtain liberty, the doctrine of constitutionalism has

(1) Prudhon, Property, Tucker's translation, pp. 271-288.

been worked out for the purpose of reconciling liberty and sovereignty. The State, says Professor Burgess, is an all inclusive and exclusive permanent sovereign (1). Sovereignty is the absolute unlimited universal power over the individual subject and over all associations of subjects. This proposition, the result of the scientific development of the conception, is boldly embraced by Professor Burgess, though he recites that most of his predecessors have endeavored to escape it. The so-called laws of God and of nature, of reason and of international comity, are legally for the subject only what the State declares them to be. These declarations or commands of the State must be presumed to contain the most truthful interpretations of these principles. Since the State consciousness and not that of the individual is the truest interpreter of abstract truth, and the safest guide of when principle shall take the form of command. This unlimited sovereignty of the State is not hostile to individual liberty, but in it is to be found the source and the support of that liberty. Deprive the State of the power to determine the elements and the scope of the individual liberty, and the individual must make such determination for himself. The determinations of different individuals come into conflict with each other. Those individuals only who have power to help themselves remain free, reducing the rest to personal subjection. History indicates that the more com-

(1) Political Science and Comparative Constitutional Law, Chapter I.

pletely and really sovereign the State is the truer and securer is the liberty of the individual.

The difficulty in the way of a general acceptance of the principle of State sovereignty is the lack of discrimination between the State and the government (1). The modern American practice of providing an organization of the State entirely distinct and different from that of the government, leaves little room for that confusion of sovereignty and government which has so long prevented clear thinking in political philosophy. It is the State as organized in public law, that is to say, the legal sovereign, which ordains the constitutions of liberty and of government. The State as thus understood is based upon the State discovered by political science, and which, according to the present principles of that science, consists in the undoubted majority of the political people of any natural political unity. Another principle of political science is that the individual, both for his own highest good and for the highest welfare of society, should act freely within a certain sphere. The impulse to such action is a universal quality of human nature. It is the legal State, as the ultimate sovereign power of society, that is alone able to define the elements of individual liberty, limit its scope and protect its enjoyment. By the State the individual is defended in the sphere of free action against the government, and through the government against all other encroachments. Against the sovereign himself,

(1) Id. p. 174.

organized or unorganized, the individual can have no sacred sphere of freedom, since this would be to limit the ultimate sovereignty of the State by the liberty of the individual. The individual may prove to the satisfaction of the general consciousness that he ought to have a wider domain of liberty, but until the political sovereign (the sovereign as conceived in political science) has persuaded the legal sovereign (the sovereign as conceived in public law) and until the latter has granted further liberty to the individual, he certainly has it not. It is submitted that the above view alone reconciles liberty with law and freedom with authority.

CONCLUSION.

The history of the State and of sovereignty, its vital principle, is the history of civilization; the record of the development of the human race from slavery to liberty; the story of the evolution of a recognized superiority of the whole community from an enforced recognition of the physical power of the individual. The conception of the State and the idea of sovereignty have had a similar development; the interaction and the reaction of theoretical and practical politics upon each other has been constant and forceful. This development has been principally along three lines, and it discloses two independent fundamental tendencies. The origin, the nature and the constitution of sovereignty are the questions which have been generally discussed by all political theorists. Three general theories of the origin of the State have been formulated: 1, Theological, which sets forth the immediately divine origins; 2, the social, basing society upon a contract of independent individuals; and 3, the historical, representing the State as a natural product of man and of society in history. This last is dominant at the present day. According to it the State is a gradual realization in legal institutions of the universal principle of human nature, and

the gradual subordination of the individual side of that nature to the universal side. The nature and constitution of sovereignty have generally been discussed in connection with each other. The development of these conceptions has progressed from the unreasoned notions of an unlimited sovereign government to the highly abstract analytical conception of the illimitable power of the political sovereign people and the equally absolute authority of a complex organized determinate legal sovereignty.

The tendency to emphasize the necessity of yielding to physical force, and the tendency to acknowledge the authority of duty are perhaps equally pronounced in the history of political theory. These tendencies are, however, by no means distinct. Force has constantly been viewed as giving rise to a theoretic duty, and thus invested with an additional claim to the respect of men. Duty, on the other hand, has not infrequently been urged as a basis of authority, not alone to induce obedience directly, but to concentrate the force of the community in order to compel the observance of duty by the argument of necessity. "The State came into existence at the dawn of society; it is as old as the individual. The existence of society without organization, and in that organization power to force conformity by individuals to the necessities of the life and growth of society, would be contrary to all experience and is absolutely unthinkable" (1).

(1) Professor Osgood, Scientific Anarchism, IV. Political Science Quarterly, 35.

In Aristotle and Plato the supreme authority of the State is impliedly recognized. By them the individual is merged into the State. He exists for it, and justice for the individual is merely to fulfill the sphere of duty determined by the government. Cicero follows Aristotle closely, but in him is seen a striving for an undefined and perhaps unlimited power of the people apart from their governmental organization. The individual, however, as such, has no claims to consideration. Aquinas recognizes the claims of the people in the interest of the superiority of the Church over secular governors. Marsilius shows a pronounced tendency to refer all political authority to the people without respect to any governmental organization. Machiavelli points out the necessity for making a State, by which he understands the organized government absolutely supreme. Bodin developes the conception of legal sovereignty, or the supremacy of the highest governmental authority in the State. The reaction now comes; the claims of the individual are recognized to the prejudice of those of the community. Grotius finds the origin of all power in the individual. Hobbes grounds the sovereignty of the State itself upon what may be termed the previous sovereignty of the individual. Spinosa shows that the authority of the individual continues present even after the establishment of an organized community sovereign. Locke derives from a consideration of the individual the authority of the people, which continues permanently supreme over any form of government established. Rousseau disre-

gards the claims of the individual and sees only those of the whole people after the people has been once constituted. But even before Rousseau the tide had again changed, and the community's claims to recognition are again favorably regarded. Montesquieu recognized the authority of the people as historically organized. Bentham derives the fundamental authority of the people from the dogmatic assertion that the greatest happiness of the greatest number is the end and aim of all social existence. Burke supports the authority of the people as organized in the course of its history. Kant from a rationalistic standpoint regards the people as an organism, and in this organism he vests absolute supremacy. Savigny finds in the people as organized in history supreme political authority. Austin, though he again turns attention to the supremacy of an established sovereign, yet bases this belief upon the habit of obedience which dominates the community at large, rather than the individuals as such. Sovereignty is now recognized as the self-sufficient source of all power, from which all specific powers are derived, and which dwells with society at large. This conception of sovereignty is not opposed to the conception of Austin, which requires a determinate human superior not in the habit of obedience to a like superior, and receiving habitual obedience from the bulk of a given community. The people is not determinate, and lacks perhaps other of Austin's essentials, but Austin's definition refers to the legal and not to the political sovereign, which is the people. The problem of sovereignty finds at

least one solution in "A union of the three elements of force, or effectiveness; universality, or reference to interests and activities of society as a whole; and determinateness, or specific modes of operation," a union brought about by the combination of the legal and the political sovereignties of the community.

BIBLIOGRAPHY.

AMOS—Science of Politics.

" " Law.

AQUINAS—Works.

ARISTOTLE—Politics (Weldon, Jowett, Grant, Grote.

" Ethics.

AUSTIN—Lectures on Jurisprudence.

BAGEHOT—Physics and Politics.

BAUDRILLART—Bodin et Son Temps.

BAUMANN—Die Staatslehre des Thomas von Aquino.

BENTHAM—Works.

BLISS - Sovereignty.

BLACKSTONE—Commentaries.

BODIN—De Republica (Francofurti, 1641); trans. Thomas Knolles.

BURKE—Works.

BURGESS—Political Science and Comparative Constitutional Law.

BROWNSON—American Republic.

BRYCE—Holy Roman Empire.

" American Commonwealth.

BLUNTSCHLI—Theory of the State.

CLARK—Comment on Austin.

CAIRD—Positive Philosophy of Kant.

CONSTANT—Lectures on Constitutional Law.

CICERO—De Legibus. Frankfurt a/M, 1824.

" De Republica. London, 1823.

CORNEWALL LEWIS—Use and Abuse of Political Terms.

DANTE—De Monarchia.

DU CANGE—Glossarium Mediae et Infimae Latinitatis.

GROTIUS—De Jure Belli et Pacis.
GUMPLOWICZ—Die Sociologische Staatsidee.
GIERKE—Johannes Althusius und die Entwicklung der Naturrechtlichen Staatstheorien.
GOODNOW—Comparative Administrative Law.
GUIZOT—Histoire de la Civilisation.
HOBBES—Works (Ed. Molesworth).
HALLER—Restauration der Staatswissenschaft.
HURD—Theory of Our National Existence.
HARRISON—Order and Progress.
HOLLAND—Jurisprudence.
HALLAM—History of the Middle Ages.
HANCKE—Bodin.
HUXLEY—Administrative Nihilism.
JAMESON—Constitutional Conventions.
KLOEPPEL—Gesetz und Obrigkeit.
KANT—Works (Ed. Rosenkranz).
LAURENT—Études sur l'Histoire de l'humanité.
LIEBER—Political Ethics.
" Civil Liberty and Self-Government.
LIGHTWOOD—The Nature of Positive Law.
LORIMER—Institutes of Law.
LETOURNEAU—La Propriété.
LOCKE—Treatises on Government.
LACY—Liberty and Law.
MACHIAVELLI—Il Príncipe.
MAINE—Ancient Law.
MORE, Sir T.—Utopia.
MONTESQUIEU—Esprit des Lois.
MILL—Liberty.
" Representative Government.
MULFORD—The Nation.
POOLE—Illustrations of Mediaeval Thought.
POLLOCK—History of the Science of Politics.
" Essays on Jurisprudence and Ethics.
PLATO—Works, Jowett.
PRUDHON—Property.
PUCHTA—Outlines of Jurisprudence.
POMEROY—Constitutional Law.

PAINE—Rights of Man.
ROUSSEAU—Contrat Social.
" Works.
SAVIGNY—Vom Beruf unserer Zeit für Gesetzgebung und Staatswissenschaft.
SPINOZA—Tractatus Politicus.
" " Theologico-Politicus.
SPENCER—Political Institutions.
" First Principles.
" Data of Ethics.
" Social Statics.
" Justice.
SIDGWICK—Elements of Politics.
STEPHEN—Liberty, Equality, Fraternity.
TUCKER—Blackstone.
TOLSTOI—Power and Liberty.
VON HOLTZENDORFF—Principien der Politik.
WOOLSEY—Political Science.
WILSON—The State.
WAITZ—Politik.
ZELLER—History of Greek Philosophy.
" Plato and the Older Academy.

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